No. 13800

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT DONALD ROWLAND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental Brief of Appellee.

LAUGHLIN E. WATERS,
United States Attorney,
RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division,
MANUEL L. REAL,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

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In argument of the instant case, the question was raised by this Court as to whether or not the appellant had exhausted his administrative remedies. The answer is that he had not, since he had not appealed his classification of 1-A. This raises the question of the effect of the failure to exhaust administrative remedies upon the ability of a defendant to contest a classification given by a local board upon trial for a violation of the Selective Service Act.

The Supreme Court, in the case of *Falbo v. United States,* 320 U. S. 549, considered the question of exhaustion of administrative remedies. In the *Falbo* case, *supra,* the Supreme Court affirmed the decision of the lower court refusing a defense as to the invalidity of the defendant's classification where he had not exhausted his

administrative remedies. In speaking of the question of challenging a classification upon a criminal trial without exhaustion of administrative remedies, the court says, at page 554:

> ". . . The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.
>
> "We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created . . . Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so."

In allowing attack of a classification given by a lower board, the court in the case of *Estep v. United States,* 327 U. S. 114, again seems to reiterate by dicta the position of the *Falbo* case, *supra,* by saying at page 123:

> "*Falbo v. United States, supra,* does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done."

Again, in *Cox v. United States,* 332 U. S. 442, the Supreme Court at page 448 reaffirmed this position in the following language:

> "Petitioners are entitled to raise the question of the validity of their Selective Service classification in this proceeding. They have exhausted their remedies in the Selective Service process and whatever their position might be in attempting to raise the question by writs of habeas corpus against the camp custodian, *they are entitled to raise the issue as a defense in a criminal prosecution for absence without leave. Gibson v. United States,* 329 U. S. 338, 351-360." (Emphasis added.)

See also *United States v. Balogh* (2d Cir.), 160 F. 2d 999.

This Court in a habeas corpus case, *Olinger, et al. v. Partridge,* 196 F. 2d 986, considered the question of exhaustion of administrative remedies in a case factually similar to the instant case. In the *Olinger* case, *supra,* the Court adopted the theory of the Supreme Court in *Falbo v. United States,* 320 U. S. 549. It is submitted that the theory of the *Olinger* case is applicable to the instant case also, and that the judgment should therefore be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
Assistant U. S. Attorney,
Attorneys for Appellee.